88-2058

Supreme Court, U.S.
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No. 88-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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PRESIDIO VALLEY FARMERS ASSOCIATION, *et al.*,
*Petitioners,*
*v.*
AMADO SALAZAR CALDERON, *et al.*,
*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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June 18, 1989

## QUESTION PRESENTED

Whether the private civil action provision of the Farm Labor Contractor Registration Act, which authorized a district court to "award damages up to and including an amount equal to the amount of actual damages, or $500 for each violation, or other equitable relief," allowed the district court to award plaintiffs actual damages for one FLCRA violation after it had previously awarded them liquidated damages for five other FLCRA violations arising out of the same transaction.

## PARTIES TO THE PROCEEDINGS BELOW

The respondents before this Court, who were plaintiffs in the district court and appellees-cross appellants in the court of appeals, are approximately 500 Mexican farm workers who were admitted to work in the Presidio Valley of Texas in 1977-78 on H-2 visas.

The petitioners before this Court, who were defendants before the district court and appellants-cross appellees before the court of appeals, are the following individuals, corporations, and partnerships which farmed in the Presidio Valley of Texas in 1977-78 and an unincorporated association of those farmers:

Presidio Valley Farmers Association
Presidio Valley Farms, Inc.
Oscar Spencer
Trinidad Pena
Francisco Armendariz
Larencio Brito
Raul Madrid
Victor Thiel
Manual Franco
Charlie Weinacht
Demetrio Carrasco
Pablo O Carrasco
Ruben H. Madrid
Jesus B. Carrasco
Cecilio Morales
K.C. Produce
Bill Bishop
Terry Bishop
Teofilio Carrasco
Hector Morales
Antonio Pena
Alberto Armendariz
Joe Turner
Jose Rodriquez
Rosendo Evaro
A.B. Foster
Madeira Valley Farms
Carlos S. Armendariz
Luis Armendariz
Flavio Estrada
Calixtro Carrasco
Presidio Produce, Inc.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

### DECISIONS BELOW

The proceeding below was the second time this case was before the court of appeals. The first decision of the court of appeals, which is reported at 765 F.2d 1334 (5th Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986), affirmed in part, reversed in part and remanded to the district court for further proceedings. Following remand, the United States District Court for the Western District of Texas, Pecos Division (per J. Lucius D. Bunton, III), issued its memorandum opinion and judgment on June 18, 1987. The opinion, which is unreported, appears at Appendix A hereof. The judgment appears at Appendix B hereof.

On January 20, 1989, the United States Court of Appeals for the Fifth Circuit rendered its decision affirming in part and reversing in part the second decision of the

district court. The decision of the court of appeals, which is reported at 863 F.2d 384 (5th Cir. 1989), appears at Appendix C hereof. The court of appeals denied the appellees' timely petition for rehearing and suggestion for rehearing en banc on March 20, 1989. This decision appears at Appendix D hereof.

## JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). The decision of the court of appeals was rendered on January 20, 1989. The appellees timely filed a Petition for Panel Rehearing and a Petition for Rehearing En Banc with the court of appeals on March 1, 1989. The court of appeals denied both petitions on March 20, 1989.

## STATUTE INVOLVED

The statutory provision involved in this proceeding is the private civil relief provision of the Farm Labor Contractor Registration Act, 7 U.S.C. §§ 2041-2058 (1977), repealed and reenacted in substantially similar form by the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872 (1983). The private civil relief provision of FLCRA, 7 U.S.C. § 2050a(b) (1977) (now found at 29 U.S.C. § 1854(c)), provided as follows:

> If the court finds that the respondent has intentionally violated any provision of this chapter or any regulation prescribed hereunder, it may award damages up to and including an amount equal to the amount of actual damages, or $500 for each violation, or other equitable relief.

The corresponding provision of the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1854(c) (1989), provides, in part, as follows:

> If the court finds that the respondent has intentionally violated any provision of this chapter or any reg-

ulation under this chapter, it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to $500 per plaintiff per violation, or other equitable relief. . . .

## STATEMENT OF THE CASE

In 1977, farmers in the Presidio Valley of Texas, a remote area located on the Rio Grande River 200 miles southeast of El Paso, Texas, faced a severe shortage of labor to harvest their onion and cantaloupe crops. They applied to the Immigration and Naturalization Service for permission to import temporary workers from Mexico pursuant to the so-called "H-2 program."[1] After much delay, the INS finally approved the admission of hundreds of temporary workers from Mexico, partially alleviating the growers' plight.

Several hundred Mexican workers admitted to work in the Presidio Valley in 1977 on the temporary "H-2 visas" later filed suit against the Presidio Valley Farmers Association and its grower members. The Mexican workers alleged that the Association and its members had violated numerous provisions of the Farm Labor Contractor Registration Act ("FLCRA")[2] and other statutes and regulations governing the H-2 program and had breached their work agreement with the Mexican workers.

The district court first entered judgment in favor of the Mexican workers on February 6, 1984. The workers had refused to answer the growers' interrogatories inquiring

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[1]The H-2 program authorizes the admission of temporary foreign workers into the United States under certain conditions. The conditions are set forth in statute and regulations at 8 U.S.C. § 1101(a)(15)(H) and § 1184(c), 8 C.F.R. § 214.2(h)(2), and 20 C.F.R. §§ 655.200 *et seq.*

[2]7 U.S.C. §§ 2041-2058, repealed and reenacted in substantially similar form effective April 14, 1983 by the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872.

about their "actual damages" and had asked the district court to award them liquidated FLCRA damages in lieu of any actual damages. As a result, the district court originally ruled that the Mexican workers had "voluntarily chosen to . . . recover their money damages in the form of a liquidated amount fixed by this Court, thus waiving any right to a sum of actual damages." The district court held that the Association had violated six provisions of FLCRA[3] and awarded liquidated damages for each of the six FLCRA violations, resulting in a total judgment of $53,700.

The workers and the growers both appealed. A major contention of the workers on appeal was that the district court had abused its discretion in setting the amount of liquidated damages for the six FLCRA violations. The Fifth Circuit, however, upheld the district court's liquidated damage awards for five of the six FLCRA violations. The Fifth Circuit vacated the liquidated damage award for the sixth FLCRA violation (failure to comply with work agreement) on the ground that the district court had not taken into account certain additional terms that the Fifth Circuit found to be part of the work agreement. The Fifth Circuit remanded this one FLCRA violation to the district

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[3]The district court found that the Association had violated FLCRA by (1) failing to register as a farm labor contractor (7 U.S.C. § 2043 (a)), (2) failing to give workers written disclosures of the work terms (7 U.S.C. § 2045 (b)), (3) failing to post disclosures of the work terms at the fields (7 U.S.C. § 2045 (c)), (4) failing to keep complete and adequate wage records (7 U.S.C. § 2045 (e)), (5) failing to provide wage receipts (7 U.S.C. § 2045 (e)), and (6) failing to abide by the terms of the work agreement (7 U.S.C. § 2044 (b) (4)).

court to reassess damages in light of the additional terms of employment found by the court of appeals.[4]

Following remand, the district court reversed its earlier ruling and held that the workers had not waived any rights to actual damages.[5] The district court issued its memorandum opinion and new judgment on June 18, 1987. The actual damages awarded by the district court on remand when added to the liquidated FLCRA damages previously awarded amounted to $705,710.53, more than 13 times the original judgment. Most of the "actual damages" resulted from application of the $^3/_4$ work guarantee, meaning the growers had to pay the workers for periods that the workers were not employed but should have been employed as a result of the $^3/_4$ work guarantee. The district court assessed the greatly increased damages even though it recognized that ". . . the amount of this Judgment may well result in many of the farmers either going out of business altogether or having to seek some form of bankruptcy" and that "it may well be that the Court will harm laborers in Mexico more in the long run than the tillers of the soil that currently are still farming the Presidio Valley."

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[4]The principal term of employment found by the court of appeals was the so-called $^3/_4$ work guarantee found in the U.S. Department of Labor's H-2 regulations. This required growers seeking to hire H-2 workers to first offer jobs to U.S. workers and guarantee employment for $^3/_4$ of the period for which the H-2 workers were sought. *See* 20 C.F.R. § 602.10a (h) (1977); *cf.* 20 C.F.R. § 655.202 (b) (6). The Fifth Circuit held on the first appeal that the growers were bound by the $^3/_4$ guarantee contained in the regulations even though they had never offered such guarantee in the petitions they filed with the USDOL and INS. 765 F.2d at 1341-43.

[5]In fact, the district court held that the workers were even entitled to pursue their claim for breach of contract under State law, a claim abandoned before the district court had rendered its original judgment and not raised on the appeal to the Fifth Circuit.

The growers again appealed to the Fifth Circuit, and the workers filed a cross appeal. On January 20, 1989, the Fifth Circuit rendered its second decision in this case, affirming in part and reversing in part the decision of the district court. The court of appeals first held that the district court had misconstrued the Fifth Circuit's mandate by holding the Association liable on remand for breach of contract under State law. The Fifth Circuit held that it had remanded the case to allow the district court merely to redetermine damages for the one FLCRA violation. According to the Fifth Circuit, "we did not reopen the legal theory involved." Even though it held that the district court had improperly relied on a new legal theory in assessing the actual damages, the Fifth Circuit nevertheless upheld the district court's award of "actual damages" for the sixth FLCRA violation in addition to the liquidated damages previously awarded for the other five FLCRA violations. The Fifth Circuit justified the award of actual damages on the ground that FLCRA merely prohibited recovery of both actual and liquidated damages for the *same* violation of FLCRA but did not prohibit the award of actual damages for some FLCRA violations and liquidated damages for other FLCRA violations, even though they arose out of the same transaction.

The workers filed both a Petition for Panel Rehearing and a Petition for Rehearing En Banc on March 1, 1989, but the Fifth Circuit denied both petitions on March 20, 1989.

## REASONS FOR GRANTING THE WRIT

**The Court of Appeal's Unprecedented Decision Upholding the Award of Both Actual Damages and Liquidated Damages for Violations of FLCRA Conflicts With the Clear and Unambiguous Language of the Statute, Conflicts with All Previous Judicial Interpretations of the Statute, And, If Allowed to Stand, Would Dangerously Expand the Power of the**

**District Courts to Inflict Punitive Damages on Farmers.**

The Fifth Circuit's interpretation of FLCRA's private civil action provision, allowing plaintiffs who establish FLCRA violations to recover both actual and liquidated damages for those violations, is novel and unprecedented, is contrary to the clear language of the statute, and conflicts with all previous judicial interpretations of the statute. The Fifth Circuit's interpretation leads to absurd results and dangerously expands the authority of the district courts to inflict punitive damages on farmers.

**a. The Fifth Circuit's Decision Conflicts With the Clear Statutory Language and Legislative History.**

The Fifth Circuit's decision allowing the award of liquidated damages for some FLCRA violations and actual damages for another FLCRA violation conflicts with the clear statutory language. The private civil action provision of FLCRA, which is basically the same as the private civil action provision now found in the Migrant and Seasonal Agricultural Worker Protection Act, authorized a district court which found that FLCRA had been violated to "award damages up to and including an amount equal to the amount of actual damages, or $500 for each violation, or other equitable relief." 7 U.S.C. § 2050a (b) (1977). The clear language of the statute authorized the district court to award up to the amount of actual damages or, in the alternative, liquidated damages up to $500 for each FLCRA violation,[6] but not both.

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[6]Courts generally agreed that a district court choosing to award liquidated damages was not required to award the full $500 for each FLCRA violation but had discretion to award *up to* $500 per violation. *Alvarez v. Joan of Arc., Inc.*, 658 F.2d 1217, 1221 (7th Cir. 1981); *Castillo v. Givens*, 704 F.2d 181, 197 (5th Cir. 1983); *Salazar-Calderon v. Presidio Valley Farmers Association*, 765 F.2d 1334, 1346 (5th Cir. 1985). This interpretation was specifically incorporated into the statute when Congress enacted MASAWPA in 1982. *See* 29 U.S.C. § 1854 (c) (". . . statutory damages of up to $500 per plaintiff per violation. . . .").

There are two aspects of this statutory provision which on their face preclude an award of both actual and liquidated damages. First, the words "or $500 for each violation" are set off by commas from the other alternatives, giving the court three clear choices: (1) award up to actual damages, or (2) award liquidated damages up to $500 for each FLCRA violation, or (3) award other equitable relief. It is clear from the wording of the statute that the phrase "for each FLCRA violation" applies only to the liquidated amount of $500 and does not apply to the term "actual damages" since it is set off by a comma. Thus, the district court may award liquidated damages "for each FLCRA violation" but not actual damages for each violation. *See Espinoza v. Stokely-Van Camp, Inc.*, 641 F.2d 535, 538 (7th Cir. 1981) ("Examining the statutory language, the disjunctive word 'or' separating the clause providing for actual damages and the clause '$500 for each violation' indicates, it seems to us, that the two forms of relief are distinct alternatives."). *See also Azure v. Morton*, 514 F.2d 897, 900 (1st Cir. 1975) ("As a general rule, the use of a disjunctive in a statute indicates alternatives and requires that they be treated separately"). Secondly, the phrase "up to and including an amount equal to the amount of actual damages" makes clear that actual damages constitute a ceiling on the amount of damages a court may award for breach of FLCRA. An award of liquidated damages in addition to actual damages would exceed the clearly mandated ceiling of the statute.

Although the legislative history of the 1974 FLCRA Amendments sheds little light on this particular issue, the interpretation above is confirmed by the subsequent legislative history of the statute. When FLCRA was repealed and reenacted in substantially similar form by the Migrant and Seasonal Agricultural Worker Protection Act, the accompanying House Committee Report discussed the nearly identical private civil relief provision of MASAWPA as follows: "Where an intentional violation has been com-

mitted, the Act permits a farmworker to recover an amount equal to his actual damages where there is no dollar limit, or statutory damages of up to $500.00 per plaintiff for each violation of a single provision. . . ." H.R. Rep. No. 97-885, 97th Cong., 2d Sess. 21 (1982). This declaration by a subsequent Congress about a provision of MASAWPA that virtually tracks the earlier provision of FLCRA underscores the clear language of the statute itself.[7]

**b. The Fifth Circuit's Interpretation Conflicts With All Prior Judicial Interpretations of the Statute.**

Not once in the 15 years since the private civil action provision was first added to FLCRA in 1974 has any court or any commentator suggested the interpretation now adopted by the Fifth Circuit. The Fifth Circuit was unable to cite any cases in support of its novel interpretation because the Fifth Circuit's interpretation is totally without precedent and contrary to the settled view of the law. This case represents the first time that any court has allowed a plaintiff worker to recover both actual and liquidated damages under FLCRA. Both circuit courts (including the Fifth Circuit) and district courts had previously stated what everyone assumed to be the state of this law prior to the Fifth Circuit's decision, *i.e.*, that a plaintiff who proved violations of FLCRA could recover either his actual damages or, in the alternative, liquidated damages of up to $500 for each FLCRA violation, but not both.

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[7] *See, e.g., Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572,596 (1980); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 380-81 (1969) ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."); *Sioux Tribe of Indians v. U.S.*, 316 U.S. 317, 329-30 (1942) (Senate Committee Report's statement concerning statute enacted five years before "was virtually conclusive as to the significance of that act").

Although there do not appear to be any decisions which can be said to directly conflict with the Fifth Circuit's decision in this case by expressly rejecting the interpretation adopted by the Fifth Circuit, this is probably attributable to the fact that, prior to this case, no one had ever advanced the novel interpretation now adopted by the Fifth Circuit. It had been the uniform understanding of the courts and counsel that a district court could not award both liquidated FLCRA and actual damages in the same case. There are many FLCRA decisions both in circuit courts and district courts which state that the district court may not award both liquidated FLCRA damages and actual damages.

In *Espinoza v. Stokely-Van Camp, Inc.*, 641 F.2d 535, 538 (7th Cir. 1981), the Seventh Circuit stated that "[e]xamining the statutory language, the disjunctive word 'or' separating the clause providing for actual damages and the clause '$500 for each violation' indicates, it seems to us, that the two forms of relief are distinct alternatives." In *Alvarez v. Joan of Arc, Inc.*, 658 F.2d 1217, 1221 (7th Cir. 1981), the Seventh Circuit observed that ". . . we held in *Espinoza v. Stokely-Van Camp, Inc.* . . . that 2050a (b) permits a district court to award either actual damages of 'liquidated damages of $500 for each violation of the act.' " In *Rivera v. Anaya*, 726 F.2d 564, 567 n.1, 569 (9th Cir. 1984), the Ninth Circuit stated that ". . . 29 U.S.C. 1854(c) [the successor to 7 U.S.C. 2050a (b)] permits a federal court, upon a finding of an intentional violation of this chapter to award damages up to and including an amount equal to the amount of actual damages, or statutory damages up to $500 per plaintiff per violation . . . It would appear that Congress was aware of the difficulty a plaintiff might encounter in measuring damages suffered under this statute and provided a measure of relief in such instances by permitting the award of actual or statutory damages." *See also Bueno v. Mattner*, 829 F.2d 1380, 1382 (6th Cir. 1987) ("A person aggrieved by an intentional

violation of the Act [MASAWPA] is granted a private cause of action and may recover actual or statutory damages. *See id.* at 1854(c)(1).").

Similarly, in *Aranda v. Pena*, 413 F.Supp. 849, 850 (S.D.Fla. 1976), the district court stated that "[a]s Plaintiffs' counsel forthrightly indicated, the statute is susceptible of more than one meaning, and may be read to limit actual damages to $500 or to authorize all provable damages and in the alternative liquidated damages not to exceed $500 for each violation . . . I must interpret the statute in a manner which effectuates rather than frustrates the major purpose of the legislative draftsmen . . . Accordingly, 7 U.S.C. 2050a (b) (1974) authorizes actual damages or in the alternative liquidated damages of $500 for each violation as well as appropriate injunctive relief."

In *De La Fuente v. Stokely-Van Camp, Inc.*, 514 F.Supp. 68, 79-80 (C.D.Ill. 1981), *aff'd in part*, 713 F.2d 225 (7th Cir. 1983), the district court stated that "[t]he plaintiffs concede that they have not proved actual damages or out of pocket losses. Out of pocket losses could have been proved . . . but the plaintiffs elected not to make that proof. Instead the plaintiffs rely upon the statutory provision for $500 for each violation and argue that each member of the class should recover that amount for each violation shown by the evidence . . . The plain meaning [of the statute] is that an amount *up to* the actual damages or *up to* $500 for each violation may be awarded or equitable relief may be given when it is appropriate."

The district court in *De Leon v. Ramirez*, 465 F.Supp. 698, 706 (S.D.N.Y. 1979), stated that "[t]he damage provisions of section 2050a (b) have been held to provide either for actual damages, or for liquidated damages of $500 per violation, as plaintiffs seek here." *See also Stewart v. James*, 519 F.Supp. 315, 321 (E.D.N.Y. 1981). In *Guerrero v. Garza*, 464 F.Supp. 509 (W.D.Wis. 1978), the district court pointed out that ". . . the critical point is

that these plaintiffs are not seeking the actual damages which FLCRA authorizes them to seek. Rather, they seek '$500 for each violation.' . . ." *See also Howard v. Malcolm,* 658 F.Supp. 423, 434 (E.D.N.C. 1987) ("The AWPA provides plaintiffs with a choice of remedies if the court finds that defendant's statutory violations were intentional. The court may award plaintiffs the amount of their actual damages, statutory damages up to $500 per violation, or other equitable relief. 29 U.S.C. 1854 (c) (1).").

The Fifth Circuit itself had interpreted the FLCRA damages provision in this way prior to its decision in this case. In *Montelongo v. Meese,* 803 F.2d 1341, 1354 n.22 (5th Cir. 1986), the Fifth Circuit noted that "[a] plaintiff under the FLSA is entitled to both compensatory and liquidated damages whereas a FLCRA plaintiff may receive either one or the other." In fact, when the *Montelongo* case was before the district court, the district court had initially found that the defendants had violated four provisions of FLCRA, for which the court awarded $500 each in liquidated FLCRA damages, and had breached a contract claim. The district court instructed the parties to seek agreement on damages for the contract claim, but it later announced that ". . . the private Defendants subsequently challenged the Plaintiffs' entitlement to any contract damages, arguing that contract damages in addition to FLCRA damages . . . would constitute double recovery. The Plaintiffs and private Defendants then agreed, essentially, that the Plaintiff class of crew members would not seek contract damages in addition to their FLCRA damages, and that the Plaintiff crew leaders would seek their actual contract damages *in lieu of liquidated FLCRA damages." Montelongo v. Bell,* No. B-77-167 (S.D.Texas, Brownsville Div.), Order of August 24, 1983, at 2. (Emphasis added.) The district court went on to conclude that the crew leaders had not met their burden of proving their actual damages with reasonable certainty and limited their damages to the same liquidated FLCRA damages awarded to the crew members. *Id.*

In *Castillo v. Givens*, 704 F.2d 181, 197 (5th Cir. 1983), The Fifth Circuit observed that "7 U.S.C. 2050a (b) provides for either actual damages or liquidated damages of up to $500 for each intentional violation of the Act." Even in the earlier decision in this case, *Salazar-Calderon v. Presidio Valley Farmers Association*, 765 F.2d 1334, 1340 n. 3 (5th Cir. 1985), the Fifth Circuit noted that "workers employed by farm labor contractors or agricultural employers who intentionally violate the Act's provisions may sue for actual damages or, in the absence of actual damages, statutory damages of up to $500 per violation."

It is clear from all the cases which have addressed this particular FLCRA provision that the universal understanding prior to the Fifth Circuit's recent decision was that FLCRA limited a plaintiff worker to recovery of either his actual damages or, in the alternative, liquidated damages up to $500 for each FLCRA violation. No one prior to this recent decision had suggested that a plaintiff could recover both actual and liquidated damages for his FLCRA violations. In a law review article that vigorously defended the FLCRA, the author noted that "[t]he Act grants the farmworker actual damages, liquidated damages of $500 for each violation, or equitable relief . . . Plaintiffs requesting liquidated damages need not show actual injury, but only that defendant violated the Act." Note: A Defense of the Farm Labor Contractor Registration Act, 59 Tex.L.Rev. 531, 538 n. 67 (1981).

**c. Prior to the First Appeal, the Workers Agreed With the Growers' Interpretation That the Statute Did Not Entitle Them Both to Actual and Liquidated FLCRA Damages.**

As noted above, the absence of cases expressly rejecting the interpretation of FLCRA made by the Fifth Circuit is undoubtedly due to the fact that no one had ever raised the issue or advanced this interpretation prior to this case. In fact, prior to the first appeal, the workers' counsel had

agreed with the growers' counsel that the workers were not entitled to recover both liquidated FLCRA damages and actual damages in this case. The workers' counsel had conceded to the district court prior to the first appeal—before the district court had set the amount of liquidated FLCRA damages the workers were entitled to recover—that they ". . . do *not* argue that each individual worker is entitled to both FLCRA statutory damages and actual damages, either under FLCRA or under the H-2 regulations. Rather, each Plaintiff will elect whether to seek statutory damages under FLCRA or his or her actual damages." Only after the first decision by the Fifth Circuit did the workers advance their novel interpretation which was subsequently adopted by the district court and the Fifth Circuit.[8]

**d. The Fifth Circuit's Interpretation Leads to Absurd Results and Dangerously Expands the Power of the District Courts to Award Punitive Damages.**

The Fifth Circuit's unwarranted interpretation of the statute, if allowed to stand, would lead to absurd results not intended by Congress and would dangerously expand the power of the district courts to inflict great financial harm on agricultural growers or even small agricultural communities like the Presidio Valley of Texas. If, as the Fifth Circuit has held, a district court has the option of

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[8]In fact, the workers' pleadings appear to concede the point. The original class action complaint merely stated that "each class member is entitled to liquidated damages of $500 for each violation of the Act" and did not mention actual FLCRA damages. When class certification was denied, 251 workers filed the *Primero* complaint which alleged FLCRA violations by the Association and the *Salazar* complaint which alleged FLCRA violations by the individual growers. The *Primero* complaint, whose allegations constitute the basis for the judgment, stated with respect to the FLCRA claims that "each Plaintiff is entitled to actual damages or liquidated damages of $500.00 for each violation of the Act." [Primero Complaint, at 13.]

awarding actual damages or liquidated damages as to each FLCRA (or now MASAWPA) violation proven, it logically follows that the district court could award actual damages for each violation. The district court could thus award many times the actual damages actually incurred by the workers. In this case, the district court could have awarded actual damages as to *each* of the six FLCRA violation, allowing the workers to recover six times the amount of their actual damages. Alternatively, the Fifth Circuit's interpretation of the statute would allow the district court to award actual damages for one FLCRA violation and the maximum $500 in liquidated FLCRA damages for each of the other FLCRA violations.

In either case, the award of damages would be far in excess of actual damages, a result which would be virtually unassailable on appeal in light of the broad discretion vested in the district courts in awarding damages under FLCRA. *See, e.g., Salazar-Calderon v. Presidio Valley Farmers Association,* 765 F.2d at 1347. Such a result, which would be a natural consequence of the Fifth Circuit's interpretation, would "violate principles of law . . . universal in their application." *Missouri Pacific Railroad Company v. H. Rouw Company,* 258 F.2d 445, 446 (5th Cir. 1958), *cert. denied,* 358 U.S. 929 (1959) (allowing plaintiff to recover more than its actual loss "would violate principles of law . . . universal in their application"). Such a result would also be contrary to the intention of Congress when it enacted the private civil relief provision of FLCRA. Congress intended the provision to be compensatory in nature, not punitive. *See Rivera v. Anaya,* 726 F.2d 564, 569 (9th Cir. 1984); *Alvarez v. Longboy,* 697 F.2d 1333, 1340 (9th Cir. 1983).

## CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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June 18, 1989

**APPENDIX A**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

| | | |
|---|---|---|
| AMADO SALAZAR-CALDERON, *et. al.* | § | |
| v. | § | NO. P-81-CA-23 |
| PRESIDIO VALLEY FARMERS ASSOCIATION, *et al.* | § | |
| PRESIDIO VALLEY FARMERS ASSOCIATION, *et al.* | § | |
| v. | § | NO. P-82-CA-15 |
| ANTONIO MONTELONGO, *et al.* | § | |

**MEMORANDUM OPINION AND ORDER**

In long and tortuous proceedings, this cause came on to be tried by this Court without a jury in Pecos and Marfa, Texas, in June, July, and October of 1986, and in January and March of 1987. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court hereby enters its Findings of Fact and Conclusions of Law.

**PRELIMINARY REMARKS**

The Judgment being entered on this date is much too long. The facts deduced during the some 17 trial days resulted in a myriad of information which, when reduced to a bare minimum, still results in such a thick Judgment and Transcript that it will scare counsel and any appellate judge that is assigned to this case. There is no way, in view of the direction previously given by the Fifth Circuit

Court of Appeals, that the trial of this case could have been shortened. It was necessary to take the testimony of some 500 plus Plaintiffs and 20 to 30 individual Defendants.

The Judgment cannot and does not reflect the true feeling of the Court. It is with a heavy heart that this Judgment is entered. The Judgment is in excess of a million dollars, and is being assessed against farmers who have worked long, hard, and diligently for many years, fighting flood, drought, bugs, weevils, hail, prices, the government, and many other things in order to put shirts on our backs and produce on our table. The Defendants are friends of the Court. I've known many of the farmers involved for three decades or more, and some of the families involved I have known for over 50 years. I know them to be industrious, hard working individuals.

Circumstances of 1977 and 1978 hopefully will never arise again. In order to prevent crops from rotting in the field, the farmers figuratively "sold their soul to the devil." They agreed to conditions and terms and prices never before agreed upon and never after the word agreed upon either. The statute to which a great portion of the Judgment relates has now been, thankfully, repealed. The situation won't arise again, and is but another chapter in the story of a valley tucked away from the mainstream of the United States. A valley where the farms and technical know-how have been developed on the United States of the Rio Grande and the requisite labor has been provided in the most part by laborers from the Republic of Mexico. Recognizing that the amount of this Judgment may well result in many of the farmers either going out of business altogether or having to seek some form of bankruptcy, it may well be that the Court will harm laborers in Mexico more in the long run than the tillers of the soil that currently are still farming the Presidio Valley.

This is not to say that the laborer who works in the broiling sun under adverse conditions is not deserving of

compensation. Most of the Plaintiffs that gave testimony were poorly clothed—illiterate or functional illiterates—downtrodden—untraveled—and unskilled save to render the backbreaking work required of one who works as a farm laborer. No one could have taken the testimony of these individuals without being touched by their plight and sympathetic for their station in life.

The farmers are not without some blame. Records were either poorly kept—not kept—or fraudulently kept. Many of the farmers set out to and did take advantage of their fellow man. The only reason that could be given for this behavior is that traditionally this had always been the case. Just because it was done wrong in the past does not mean that this wrong should continue.

The Judgment will be explained in the paragraphs immediately following. It should be pointed out that, except in the case where a worker received absolutely nothing for various and sundry reasons,[1] there is an exact amount given. This is so even though there were different farmers, crops, hours and wages.

The lows run from just a few dollars to something in excess of $25,000 for a seriously injured person. The Court is thankful for modern office machinery which will allow the totals to be carried forward and for computers that can print out great gobs of information.

This was not a "fun lawsuit" to try. It was long and tedious for counsel and the Court. The result does not satisfy the Trial Judge, as it works an extreme hardship on the Defendants and might well condemn the children of the Plaintiffs to starvation.

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[1]On page 23, one Otilia Baeza de Enriquez received zero dollars. Otilia worked without a permit. As a consequence, no damages could be awarded, as one who worked "wet" didn't come under the program.

## I.

## PROCEDURAL HISTORY

Before proceeding to merits of the issues before this Court, a survey of the procedural history of this case is necessary.

This case presents the claims of myriad Mexican Nationals against the PRESIDIO VALLEY FARMERS ASSOCIATION (PVFA) and its grower members who employed them during the 1977 and 1978 harvest season. The Plaintiffs allege that the Defendants violated the terms and conditions of their employment agreement, and that the Defendants violated numerous provision of the Farm Labor Contractor Registration Act (FLCRA), 7 U.S.C. §§ 2041, *et. seq.*

In 1977, the PRESIDIO VALLEY FARMERS ASSOCIATION requested permission from the Immigration and Naturalization Service (INS) to import Mexican farm laborers pursuant to the Immigration Services "H-2 Program." 8 U.S.C. 1101(a) (15) (H) (ii). Eventually, 809 visas, 661 six-month visas, and 148 one-year visas were granted.

In 1978, PVFA again filed for visas, but its application was rejected because of the Association's failure to comply with the required terms of work governing the 1977 visas. In response, the Association filed *Presidio Valley Farmers Association v. Marshall,* EP-78-CA-95 (now P-82-CA-15), to compel INS to issue visas.

The El Paso Division entered an injunction ordering the visas issued by May 24, 1978, on the condition that the growers comply with the work terms set forth in 20 C.F.R. § 655. In July, 1978, ANTONIO MONTELONGO and several Mexican H-2 workers moved to intervene on behalf of a class of workers employed by the Association to counterclaim against PVFA for violations of the 1978 work contract. Later in 1979 and 1981, Mexican H-2 workers who received visas during the 1977 season filed three addi-

tional class actions charging PVFA with contract and FLCRA violations.

The cases involving the 1977 season were eventually consolidated under the caption *Salazar v. Presidio Valley Farmers Association,* P-81-CA-23, and the case was transferred to the Pecos Division. The *Montelongo* case, EP-78-CA-95 (now P-82-CA-15) was transferred to the Pecos Division in 1982. The Court denied certification of the classes in both of the cases, and several hundred individual workers sought to intervene. Thus the case went forward with a large number of individual Plaintiffs.

Because of the large number of parties suing, counsel for both sides agreed to a number of steps to facilitate the Court's decision in the two cases. First, the parties agreed to submit to the Court cross motions for summary judgment so that the Defendant's obligations under the FLCRA, and so the terms and conditions of employment that Defendants were required to offer could be established. The parties stipulated to certain facts and supported their respective motions with documentary proof that had been developed in discovery.

In January 1983, the Court ruled on the cross motions for summary judgment that the terms set forth in the Labor Department's H-2 regulations, 20 C.F.R. § 602.10 (1977), applied to the 1977 visas. However, the Court also ruled that the three-fourth work-days guarantee, the payment of daily transportation expenses, and the adverse effect wage of $2.83 were not part of the agreement.

The contract terms applicable during the 1978 season were established by the injunction compelling the issuance of the visas.

After determining liability, the Court ordered a separate trial on the issue of damages. In July 1983, a hearing was held to determine how to resolve the damage issue in the two cases. Because the principal monetary terms of the

1977 contract had been rejected by the Court, the Plaintiffs agreed to waive their remaining actual damage claims and to pursue only the liquidated FLCRA damages. This agreement was made with the understanding that Plaintiffs would be able to prove their claims for liquidated damages using the testimony of a sample of the individuals who had worked during the two seasons and by using the interrogatory answers filed by the remaining Plaintiffs. Because the Court was under the impression that all the parties before the Court had agreed to this procedure, the Court consolidated the two cases for trial in October 1983. Judgments were entered in both actions in the spring of 1984.

Both parties appealed the Court's rulings in both cases. In the *Salazar* case, the Fifth Circuit affirmed the Court's determination that the AEWR of $2.83 per hour was not one of the terms of the employment agreement. However, the Fifth Circuit reversed the ruling that the three-fourth work-day guarantee and the $5.00 weekly transportation allowance were not part of that agreement. The rulings finding that PVFA was a farm labor contractor and a joint employer of the Plaintiffs, and that the PVFA and the growers intentionally violated the FLCRA were affirmed. The Fifth Circuit also affirmed the liquidated damages awarded for the Defendant's breaches of the FLCRA. This Court's decision regarding the award of damages for the Defendant's breaches of the work agreement was vacated, and the cause was remanded so that this Court could reconsider those damages in lieu of the additional terms the Fifth Circuit found to be part of the work agreement. The Fifth Circuit also directed this Court to correct any possible clerical errors or other errors in the judgment. Finally, the Court of Appeals held that denial of class certification was not an abuse of discretion, but indicated that this Court could reconsider this issue on remand.

The appellate court made similar rulings in the Montelongo case, remanding the breach of agreement claims for

retrial, and suggesting reconsideration of the class ruling. In addition, the Fifth Circuit held that in the 1978 case, unlike the 1977 case, the individual members of the by-then incorporated Association, could not be held jointly and severally liable for PVFA's FLCRA violations. With the above mentioned considerations in mind, the Court now turns its attention to addressing the remaining issues in this case.

## II.

In footnote 18, on page 1353 of the Fifth Circuit's opinion, this Court was directed to first address the issue of whether the Plaintiffs have waived their right to actual damages. *Salazar-Calderon v. Presidio Valley Farmers Association,* 765 F.2d 1334 (1985). This Court does not believe that the Plaintiffs waived their right to actual damages. In the 1984 damages proceeding, the Plaintiffs agreed to forego their claim for actual damages so that a simplified trial proceeding could be implemented. In 1984, the Court and the Plaintiffs both believed that the Defendants had agreed to the simplified trial proceeding. Given the fact that all the litigants had not agreed to the trial procedures the Court used in 1984, the Court is of the opinion that the Plaintiffs' waiver was of no consequence as it was a conditional waiver. In any case, the Fifth Circuit allowed this Court to decide this issue anew. In Note 18, on page 1353, they stated:

> If there has been such a waiver, the Court may nevertheless find it appropriate to vacate its liquidated damages award for the violations of the work agreement and reassess liability and damages in light of these additional terms.

This Court is of the opinion that, in light of the additional terms of the work agreement, the previous liquidated damages award with respect to the work agreement should be vacated, and that actual damages should be de-

termined. Thus, the liquidated damage award for the violations of the work agreement is hereby VACATED.

In its opinion, the Fifth Circuit left it up to this Court to decide whether or not to reconsider its previous class certification rulings. This issue was reconsidered, and April 17, 1986, this Court certified a class in this cause. The class action device has frequently been approved in suits under the FLCRA. *Almandarez v. Barrett-Fisher Co.,* 762 F.2d 1275 (5th Cir. 1985); *Alvarez v. Joan of Arc, Inc.,* 658 F.2d 1217 (7th Cir. 1981); *Izaguirre v. Tankersley,* 516 F.Supp. 755 (D. Or. 1981). Although a class in this case was certified some five years after this suit was brought in Pecos, the certification was timely. There is no set deadline by which a court must act in certifying a class. *Gore v. Turner,* 563 F.2d 159 (5th Cir. 1977).

As such, this Court reconsidered its previous class certification ruling and ruled that class certification was proper.

In the previous ruling, the claims of the *Zuniga* claimants were held to be barred by limitations. In 1984, this Court calculated that the Plaintiffs could only recover for any of Defendants' actions that violated FLCRA after May 9, 1978. Since no Plaintiffs worked after April 30, 1978, the *Zuniga* intervenors were ruled to be time barred.

The Court of Appeals directed that the limitations deadline applicable to the *Zuniga* claimants should be calculated anew. The Fifth Circuit ruled that the limitations calculations were off by 39 days. According to this figure, the proper limitations deadline is April 1, 1978. The Court is of the opinion that none of the *Zuniga* claimants are time-barred. In addition, it would not be just to exclude the *Zuniga* intervenors from a class to which they surely belong. As such, the *Zuniga* claimants are hereby included in the class.

Once the class was certified, the Court set a May 31, 1986 deadline for proof of claim forms to be filed. A number of class members who testified at trial did not file timely claims. The Court is of the opinion that these claims should be allowed despite the fact that their proof of claim forms were filed late. A trial court has great discretion to accept newly filed claims of class members. *Kilgo v. Bowman Transportation, Inc.*, 789 F.23 859 (11th Cir. 1986); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986); *Montelongo v. Meese*, 803 F.2d 1341 (5th Cir. 1986).

The Court cannot see how the Defendants can be prejudiced by the inclusion of the late claimants. Their testimony was similar to the other class members, and the Defendants had plenty of time to respond to any of the new claims. Indeed, none of the untimely claimants offered any surprising testimony. Thus, this Court will exercise its discretion and allow the claims that were submitted late.

A related issue concerning what claims are to be allowed involves the issue of surrogate testimony.

A number of the Plaintiffs attempted to prove their claims through surrogate testimony, i.e., the testimony of relatives, fellow workers, and friends. Such testimony has been recognized by the Fifth Circuit as an acceptable method to establish wage claim damages, especially in light of the lowered standard of proof applicable to such claims. "Testimony of some employees concerning the hours worked by groups of non-testifying employees is sufficient if those who do testify have personal knowledge of the work performed by those who do not." *Beliz v. W. H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1331 (5th Cir. 1985); *Castillo v. Givens*, 704 F.2d 181, 195 (5th Cir. 1983); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472 (11th Cir. 182). The use of co-worker testimony is even more appropriate when class damages are being calculated. The critical requirement is simply that the surro-

gate have personal knowledge of the non-testifying Plaintiff's work.

The Court was not persuaded by the surrogate testimony of friends. Aside from the surrogate testimony offered by relatives, the Court found surrogate testimony to be without credibility as this testimony was not based on personal knowledge.

Only the surrogate testimony of relatives and family members will be allowed. Therefore, the Court is considering all the claims from class members that filed a proof of claim form, and who testified, either in person or through the surrogate testimony of relatives.

**III.**

The Fifth Circuit directed this Court to reassess its award in light of the Court of Appeals' conclusion that the $^{3}/_{4}$ work week guarantee and the $5 transportation allowance were part of the work agreement. It is clear to the Court that the transportation allowance was not paid to any of the workers, and that, with rare exception, the $^{3}/_{4}$ work week guarantee was not complied with. Thus the Court is essentially rehearing this cause to redetermine the Plaintiffs' damages.

To make a thorough determination, the Court listened to 507 class members, each of whom required the use of an interpreter.

In cases such as this, where liability has been established, an award of damages serves to vindicate public interests as well as to provide private compensation, damages need not be proven with certainty. It is sufficient that the damages be proven as a matter of "just and reasonable inference." *Anderson v. Mt. Clemons Potter Co.*, 328 U.S. 680, 687-88 (1946) (FLSA); *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) anti-trust); *In Re Plywood Anti-trust litigation*, 655; F.2d 627,

635 (5th Cir. 1981) (antitrust); *Pettway v. American Cast Iron Pipe Co.*, 681 F.2d 1259, 1266-67 (1th Cir. 1982) (Title VII).

The "just and reasonable inference" standard may be met with admittedly inexact or approximate evidence. *Mt. Clemons Pottery,* 328 U.S. at 687; *Reeves v. International Tel. & Tel. Corp.*, 616 F.2d 1342, 1351 (5th Cir. 1980) (damages based on the "rough calculations of [the plaintiff's] subconscious mind affirmed by appellate court.") (Court had discretion to calculate farm workers' hours from testimony which was a "maze of total and complete confusion"). Once that prima facie showing has been made, the burden shifts to the Defendants "to come forward with evidence to negate the reasonableness of the inference to be drawn from the employees' testimony." *Beliz v. W. H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1330 (5th Cir. 1985).

The Defendants did not offer any evidence to rebut the Plaintiffs' testimony. As this Court pointed out in its first decision, the farmers either lost whatever records they had, or didn't keep records at all. Only in a few instances were records actually kept and retained.

Having listened to over 500 H-2 workers, the Court is of the opinion that the farm workers' claims are credible. Understandably, a clear and detailed recollection of the facts was not possible. Fading memories can do much to cause inaccuracies between what was testified to and what was answered in the interrogatories. Thus, for the most part, the Court is relying on the written responses of the proof of claim forms in assessing the Plaintiffs' damages. A number of factual findings had to be made before the Plaintiffs' damages could be assessed. These findings include:

(a) the duration of the visa period;

(b) the crops grown and duration of each crop activity;

(c) the wage rates paid for each crop activity;

(d) the hours and days of work performed by each worker in each crop activity;

(e) the productivity rates of workers employed in piece-rate crops; and

(f) inference to be applied to the testimony and interrogatory answers.

Based upon the testimony heard, and on the answers to the interrogatories, a number of assumptions were made. Those assumptions will be discussed in the following sections of this memorandum.

**The Visa Period**

The testimony is uncontradicted that the 1977 visas were issued on June 9, 1977. Based upon the testimony of INS Agent-in-Charge Doug Keim, it appears that the shorter visas were in effect for a full six months from the date of issue, i.e., until December 9, 1977. The 1977 one-year visas ran from June 9, 1977 until May 24, 1978 (see Temporary Restraining Order, May 18, 1978). This testimony was corroborated by one of the workers who produced his 70-day visa at trial and by the testimony of several one-year workers that their visas expired in the latter part of May 1979.

Plaintiffs' damages are, therefore, based upon the following visa periods:

| Visa | Period | Weeks |
|---|---|---|
| **1977** | | |
| 6-month | June 9, 1977-December 9, 1977 | 26 |
| 12-month | June 9, 1977-April 30, 1978 | 47 |
| **1978** | | |
| 70-day | May 24, 1978-August 2, 1978 | 10 |
| 12-month | May 24, 1978-May 23, 1979 | 52 |

**Crops Grown and Duration of Crops Activities**

The Defendants' testimony and admissions introduced at the first trial provide a basis for determining what crops were harvested during the visa period and the maximum length of those crop activities (see Appendix B). These findings are necessary since workers occasionally were confused about dates and claimed to have worked in crops which were not harvested during the years in question or claimed to have harvested crops for far longer than was physically possible, e.g., harvesting melons for more than 30 days.

**Wage Rates**

The testimony and documentary evidence in the record establishes that, subject to exceptions that will be discussed below, the growers paid the following rates:

*Melons* (harvesting, weeding, and straightening):
1977: $2.20/hour
1978: $2.97/hour

*Onion Harvesting:*
1977: $0.35/bushel
1978: $0.40 or $0.45/bushel[2]

Chile Harvesting:
1977: $0.25/basket
1978: none harvested

*Bell Pepper Harvesting:*
1977: $2.20/hour

*Cotton:*
1977: $2.50, $3.00, or $4.00/100 lbs.
Since there was no prevailing amount reported, the rate as stated on the individual interrogatory answer is used.

[2]In the damages calculation program used for the Judgment in the Montelongo case, all Plaintiffs who indicated an onion piece rate less than $0.40 per bushel were assumed to have worked for that rate. Those who cited any wage rate in excess of $0.45 per bushel were reduced to the $0.45 rate.

*Weeding:*
1977: $2.20/hour
1978: $2.97/hour

*General Farm Labor* (including irrigation, tractor driving, and other manual labor):
1977: $2.20
1978: $2.97

*Onion Tying & Transplanting:*
These tasks were paid at varying rates in both years. Inasmuch as the rates set forth in Plaintiffs' testimony and interrogatory answers were uncontradicted, those rates are used in the Judgment calculations.

The above rates were used in calculating the minimum wage damages of all workers, regardless of the rates claimed in the interrogatory answers or oral testimony, except as noted above with respect to onion transplanting operations and the cotton harvest in 1977, and except as set forth below in the section discussing hourly wage activities.

**Hours and Days of Work**

A few of the growers kept reliable contemporaneous work records of their 1977 melon harvest. Where available, these records were used to determine the number of hours worked in melons. In all other respects, the interrogatory answers provide the best evidence of the hours worked in each crop activity and were used in the Judgments.

**Productivity Levels**

Productivity levels also varied from worker to worker and crop to crop. The evidence submitted at trial established that the productivity levels reported by each worker in answer to interrogatories are reasonable and were relied upon by the Court. Reliance on the interrogatory

answers is especially appropriate in light of the fact that the growers kept no hourly records of piece-rate work from which a more accurate productivity figure could be calculated.

The damage calculations are, therefore, derived from the individual work histories of the worker for each separate crop and grower, as contained in the interrogatory responses. If a class member was unable to remember his or her piece-rate productivity per day, the mean from all other reporting individuals is used in the minimum wage calculations for that worker.

**Additional Inferences**

Whether the Court relies upon the interrogatory answers or the testimony, it is necessary to make certain reasonable inferences to convert that evidence into a damage calculation. These inferences include the following:

1. If a range of values is given, e.g., "I worked 2-3 weeks," or "I picked 40-45 bags/hour," the mean of the high value and the low value is used.

2. If there is no indication of the number of days worked per day, five days is assumed.

3. If there is no indication of the number of hours worked per day, then eight hours is assumed.

4. If a worker indicated that he or she performed work from one month to another, the beginning date for the period is assumed to be the first day of the month and the ending date is assumed to be the 15th day of the month, unless the context indicates otherwise.

5. If any necessary item of information (other than the ones discussed in 2, 3, and 4 above) is missing from the interrogatory answers or testimony, the mean value for that item derived from all of the interrogatory answers is used.

6. If the cost of tools, medical services, wages in Mexico, or other expenses are expressed in Mexican currency, an exchange rate of $22.50MN per $1.00 is used for 1977 and $22.70MN per $1.00 is used for 1978, based upon tables from the International Monetary Fund (see Appendix C).

## IV.

## ELEMENTS OF ACTUAL DAMAGES CALCULATIONS

The damage calculations for each of the class members is divided into nine major elements, each of which is summarized immediately below and is described in greater detail in the subsection that follows;

1. *Contract.* Damages for violation of the contractual guarantee that wages would be paid for three-fourths of the work days of the visa period.

2. *Minimum Wages.* Damages for the difference between the wages actually received on an hourly basis and the federal guarantee of $2.20 per hour in 1977 and $2.97 in 1978.

3. *Transportation.* Damages for violation of the requirement that each worker receive a commuting allowance of $5 per week in 1977 and $8 per week in 1978.

4. *Housing.* Damages for violation of the agreement to pay a $5 per day housing allowance, in lieu of providing housing, to each worker who migrated from outside the Presidio/Ojinaga area in order to work for the Association.

5. *Equipment.* Damages for violation of the agreement to provide tools and equipment free of charge to the workers.

6. *Breach of Contract.* Damages for violation of terms of the work agreement, including the failure to pay for all hours worked.

7. *Personal Injury.* Damages for breach of the agreement to provide workers compensation or equivalent insurance for personal injuries which occurred during the course and scope of employment with the Association.

8. *Future Medical.* Damages for failure to reimburse injured workers for reasonable and necessary future expenses for medical care, resulting from an on-the-job injury that was not covered by workers compensation or its equivalent.

9. *Mitigation.* Amounts which were earned or could have been earned by the exercise of reasonable diligence by each Plaintiff in seeking alternative employment in Mexico.

**Contract Damages**
**(and amount of work guaranteed)**

The damages for violation of the "$^{3}/_{4}$ guarantee" are calculated by (1) determining the gross hours of work guaranteed, (2) subtracting from that the gross hours of work performed by each worker, and (3) multiplying that result by the guaranteed hourly rate for the year in question. The mitigation factor is separately expressed and is discussed below.

The testimony was uncontradicted that the 1977 visas were issued on June 9, 1977 and ran for six months, i.e., a period of 26 weeks. There is more of a question with regard to the number of contract hours per week. The 1977 Clearance Order and "Job Offer for Alien Employment" both indicated a contract that would provide 56 hours per week. The Visa Petitions stated a work week of "40-60" hours.

The regulations would not have permitted more than a six-day work week, 20 C.F.R. § 202 (b) (6) (i), and workdays were eight hours long. Thus, the Court is of the

opinion that a work week was 40 hours long, so damages are based on a 40-hour work week.

There were a total of 1040 hours in the visa period (26 weeks x 40 hours/wk = 1040). Of these hours, 780 were guaranteed.

With regard to the one-year visas, the visas were valid until April 30, 1978. Thus, the total visa period covered 1880 hours, of which 1410 were guaranteed (47 x 40 x $^{3}/_{4}$ = 1880).

The majority of the 1978 visas were issued for 70 days, and some visas were issued for one year. As in 1977, the visa petitions guaranteed 40-60 hours of work per week. Assuming the minimum of 40 hours per week, there were 400 hours of work during the 70-day visa period, of which 300 were guaranteed (10 wks. x 40 hours x $^{3}/_{4}$ = 300 hours. There were 2080 work hours in the one-year visa period, of which 1560 hours were guaranteed 52 weeks x 40 hours x $^{3}/_{4}$ = 1560 hours.

Whether a Plaintiff worked in 1977 or 1978, and whether she received a one-year or a shorter visa is, for the most part, determined from the interrogatory answers. In a few cases, reliance on oral testimony is appropriate to clarify the interrogatory answers. Appendix D sets forth the names of workers and the oral testimony which should be taken into consideration in determining the visa length.

The actual amount of work performed by each Plaintiff is generally calculated by adding the time worked in each crop or activity, as reported in the sworn interrogatory answers or proof of claim forms. As with the other damage calculations, the grower's admissions as to the crops they grew and the maximum duration of each harvest was considered, and work in crops which were not grown in the year claimed or which were grown outside the visa period were disregarded.

**Minimum Wage Violations**

The most systematic and persuasive minimum wage violations occurred in the piece-rate crops, e.g., harvesting onion, cotton, and chile, transplanting onions, and similar activities. There was no record of the hours actually worked in the piece-rate operations. Unfortunately for all concerned, the only recourse has been to rely upon the recollections of hundreds of laborers.

To calculate the wage underpayments in the piece-rate activities, the piece rate paid for each operation is multiplied by worker's productivity level (e.g., units harvested per hour). The product of those two factors gives the employee's average hourly earnings rate, and that amount is multiplied by the estimated number of hours worked to give the actual pay the worker earned (observed pay). The minimum lawful pay (expected pay) is determined by multiplying the minimum rate—$2.20 or $2.97—by the number of hours worked in the crop. Expected pay minus observed pay yields the minimum wage damages for that crop.

The factors necessary for making this calculation—the piece rate, productivity rate, and hours of work in a crop—are determined from the interrogatory answers and findings and inferences discussed above. No piece-rate damages are awarded in crops which were harvested before the visas were issued, or which were not grown in the year claimed.

Unlike the piece-rate operations, the growers generally paid hourly rate operations, such as the melon harvest, at the rates required by the visa/contracts: $2.20 per hour in 1977 and $2.97 per hour in 1978. The evidence reveals several glaring exceptions to the general compliance with the minimum wage on hourly crops.

Numerous witnesses claimed at trial that TRINI PENA, ANTONIO PENA, and several other growers in the Red-

ford area paid less than the required hourly wage in both 1977 and 1978. No evidence was submitted to rebut this testimony, despite the fact that several of the accused growers took the witness stand. Another area of general noncompliance with the minimum wage requirements was with regard to irrigators, several of whom testified that they were only paid for eight hours while actually working a longer shift. Where such violations occurred, the number of hours claimed is the number used to calculate damages. However, the Court used a cap of 15 hours on such claims.

The Court's findings are for the most part calculated on the basis of the interrogatory answers. A minimum wage damage amount was calculated for any class member whose effective hourly rate was less than the applicable wage rate for the season in question. That calculation is made for each crop, operation, or activity, by individual, by grower, and the results are included in the column title "Min, Wage," together with the piece-rate minimum wage damages.

**Transportation**

Under the contracts, all workers were entitled to a daily transportation allowance of $5 per week in 1977 and $8 per week in 1978. How a worker actually chose to get to work—whether by walking or riding in his own or someone else's truck—is irrelevant to a worker's entitlement to transportation damages. The amount of transportation damages is calculated in the Proposed Judgments by multiplying $5 per week by the number of weeks in the visa period.

**Housing**

The 1978 visa petition and clearance orders submitted by the Defendant growers provided for the payment of a $5 per day housing allowance for all workers who lived outside reasonable commuting distance from Presidio. This

amount is properly awarded to all Plaintiffs for the duration of the visa period. The fact that some may have found accommodations with relatives where they did not have to pay does not relieve Defendants of liability for housing allowance. Like transportation, the housing allowance was something guaranteed to workers, which they could spend as they saw fit.

The situation in 1977 was similar to 1978, except that the visa petitions did not specify the dollar amount to be paid in lieu of the furnishing of actual housing. Equity dictates that the same $5 per day allowance offered in 1978 represents a reasonable and fair housing allowance.

The housing damage in each case reflects the housing allowance for each worker who testified, either in person or through a proof of claim form, that he or she was required to migrate from outside the Presidio/Ojinaga area for this employment opportunity.

**Equipment**

The amounts paid for tools and equipment listed in the interrogatory answers generally conformed to the testimony at trial, and it is just and reasonable to use the interrogatory figures to calculate the damages owed for this violation. The damages for equipment indicate the amount of expenses that each worker estimated had been incurred for these items (e.g., scissors, baskets, hoes, cotton sacks, and similar items).

**Breach of Contract**

This category of damages includes several miscellaneous claims that do not fit well within the other contract damage categories. For example, several workers testified to being paid for fewer hours than they worked. Calculations for these claims are generally based on their interrogatory answers or proof of claim forms.

**Personal Injuries**

One of the terms and conditions of employment called for the Defendants to provide the H-2 workers with Workmen's Compensation or an equivalent insurance for any personal injuries that occurred during the course and scope of their employment with the Association. The Defendants failed to live up to this obligation. The Court must look to Texas law as it existed in 1977 and 1978 to determine the scope of the Defendants' obligation.

Under Texas law, Defendants were obligated to provide compensation to any employee that was incapacitated for a period of at least one week, and were to pay for any medical expenses that were reasonably required at the time of an injury, and at any time thereafter as needed to cure or relieve the natural effects resulting from any injury. Texas Civil Statutes, Art. 8306, §§ 6 and 7. With the provisions of Texas Worker's Compensation law in mind, the Court turns its attention to the personal injuries the Plaintiffs claim were suffered in the course and scope of their employment with the Association.

**Frutoso Baca-Carabeo**

This plaintiff claims that he burned his right thigh while working for the Association. This injury allegedly happened when MR. CARABEO was lighting a fire. His claim is that his pants caught fire as he lit the fire. The Court does not find this claim to be credible; thus, this Plaintiff is to take nothing by his personal injury claim.

**Guillermina Primero-Aguirre**

This Plaintiff claims that she drove a stick through her right ankle while working in the scope and course of her employment. This injury required medical attention. The Court finds that this Plaintiff was injured in the course and scope of her employment.

The claimant was not incapacitated for more than one week, but she did incur medical expenses in the amount of $125. Thus, the Court is of the opinion that GUILLERMINA PRIMERO-GUIRRE should recover $125 for the medical expense she incurred.

**Robert Salazar-Martinez**

Plaintiff was injured in July 1977 when an irrigation pump he was working on exploded. The explosion caused third degree burns on 15% of the Plaintiff's torso and face. The Court is of the opinion that this injury occurred in the course and scope of Plaintiff's employment, and that he is entitled to compensation. Plaintiff suffered a partial permanent injury. The reasonable settlement value of this case is $8,000. Charlie Weinach paid $30 of the Plaintiff's medical expenses, but Plaintiff paid for $150 of his own expenses. The Court is of the opinion that Plaintiff is entitled to $8,150 for his personal injuries.

**Bertha Urguidi de Marquez**

This Plaintiff claims that she became ill after drinking the water the Defendants provided. The Court was not persuaded by her testimony and found her story to have no credibility. Accordingly, this Plaintiff is to take nothing with regard to her personal injury claim.

**Maximino Cabrera-Lopez**

Plaintiff seeks to recover the medical expenses he incurred from an injury he suffered while working for Defendants. This Plaintiff fell off of a cantalope trailer and hurt his arm and shoulder. The injuries were not serious, and Plaintiff was back at work the day after his mishap. However, Plaintiff paid $50 for medical attention in Ojinaga, Mexico. The Court is of the opinion that this Plaintiff should recover $50 for his medical expenses.

**Lino Saenz Ruiz**

This Plaintiff was injured in May 1978 while working in the course and scope of his employment. The injury occurred while lifting a bundle of onions. Jose Rodriguez took Plaintiff to a hospital in Ojinaga. The grower paid for MR. SAENZ' doctor and for his three-day stay in the hospital. However, Plaintiff suffered a total and permanent injury for which he was not compensated. The evidence shows that Plaintiff suffered a disabling back injury and is likely in need of disc surgery. As such, the Court is of the opinion that this Plaintiff is entitled to $20,000 for a total and permanent injury, and to $5,000 for future medical expenses. Thus, Plaintiff is to be compensated for his personal injuries in the amount of $25,000.

**Guerrero Hinojos-Aguirre**

The personal injuries suffered by this Plaintiff shed light on the type of working conditions Defendants provided for the Plaintiffs. This Plaintiff, without the benefit of protective gear, was working with pesticides in a large vat. The solution was stirred with a stick. Working with the pesticides caused Plaintiff to have severe respiratory problems, and to vomit blood. Plaintiff paid $1,600 for medical attention in Ojinaga, Mexico. The Court is of the opinion that the compensation value of the case is $10,000. Accordingly, this Plaintiff is entitled to $11,600 for his personal injuries.

**Norberto Primero-Arteaga**

Plaintiff PRIMERO-ARTEAGA was injured while removing rock from one of the fields. The trailer Plaintiff was in tipped over, causing him to injure his head, back, and arm. The fall knocked Plaintiff out for 20 minutes. Plaintiff testified that he paid $2,000 for medical attention, and that his boss refused to allow him to come back to work. The Court is of the opinion that Plaintiff is entitled

to $20,000 in compensation and to recover the amounts expended for medical attention.

The $20,000 reflects the settlement value of the case. Thus, Plaintiff is to recover a total of $22,000 for his personal injuries.

**Soteo Leyva Arevalo**

This Plaintiff claims that he became ill from drinking the water the Defendants provided. The Court is of the opinion that this is not a credible claim, and that Plaintiff is to take nothing for his alleged personal injury.

**Luis Anaya Terrazas**

This Plaintiff was seriously injured in the course and scope of his employment. He was impaled by a rebar while working, and was hospitalized for one month as a result of those injuries. Plaintiff incurred medical expenses in the amount of $5,000. The Court is of the opinion that the reasonable settlement value of this case is $6,000. Accordingly, Plaintiff is entitled to recover $11,000 for the personal injuries he suffered while working for the Defendants.

**Armando Nieto-Mendoza**

This Plaintiff is seeking to recover for an illness he claims was caused by the drinking water the Defendants provided. The Court is of the opinion that this claim is without merit. Thus, NIETO-MENDOZA is to take nothing by this claim for his alleged personal injury.

**Ignacio Chavira Gutierrez**

This Plaintiff suffered a testicular hernia as a result of lifting some tractor machinery. Plaintiff told his supervisor, Jose Rodriguez, about the injury. Mr. Rodriguez took Plaintiff to the bridge, and Plaintiff walked to a doctor's office in Ojinaga. Dr. Jose Ibarra performed surgery on

Plaintiff to correct the hernia. The operation required the doctor to remove part of the Plaintiff's injured testicle. Plaintiff spent $3,954 for the medical treatment he received. The injury suffered by Plaintiff would be considered a partial permanent injury, and would have a settlement value of $5,000. As such, Plaintiff is entitled to recover $5,000 in compensation and $3,954 for his medical expenses, or a total of $8,954 for his personal injuries.

**Carmen Tabarez Carrasco**

This Plaintiff claims that he hurt his foot while working for the Association. The Court is of the opinion that the testimony of this Plaintiff, with regard to his personal injury, was not credible. Thus, this Plaintiff is to take nothing by way of his personal injury claim.

**Jose Aranda-Tabarez**

Plaintiff claims that he was injured and that he lost eight days of work because of his injury. The Court is of the opinion this Plaintiff's personal injury claims are not credible. As such, this Plaintiff is to take nothing by way of his personal injury claim.

**Nestor Calderon-Franco**

Plaintiff CALDERON twisted his ankle while working in the course and scope of his employment with the Defendants. The injury did not require Plaintiff to miss more than a week of work, so he is not entitled to any compensation. However, Plaintiff spent $150 for medical treatment of his injury. Thus, NESTOR CALDERON-FRANCO is entitled to recover $150 for the injury he suffered.

**Melton Carrasco Lujan**

Plaintiff alleges that he suffered from dehydration while he was working for the Defendants. The Court is of the opinion that this claim lacks credibility. Accordingly,

this Plaintiff is to take nothing for his personal injury claim.

**Antonia Corral Madrid**

Plaintiff MADRID fell backwards off of a melon trailer and injured her back and her midsection. This injury occurred while Plaintiff was in the course and scope of her employment. The Court is of the opinion that Plaintiff suffered a partial permanent injury that has a settlement value of $10,000. This injury is likely to require future medical treatment in the amount of $3,000. Accordingly, Plaintiff is entitled to $13,000 for the personal injuries she suffered.

**Jose Rios-Morales**

Plaintiff RIOS hurt his ankle while working in the course and scope of his employment with the Association. This injury did not require Plaintiff to miss more than a week of work, so Plaintiff is not entitled to any compensation. However, Plaintiff spent $150 for the treatment of his injury. Thus Plaintiff RIOS is entitled to recover $150 for the personal injuries he suffered.

**Raul Hernandez Armendariz**

Plaintiff claims that he suffered from dehydration while working the course and scope of his employment. The Court is of the opinion that this claim lacks credibility. Accordingly, this Plaintiff is to take nothing by way of his personal injury claim.

**Carmen Lara-Sanchez**

CARMEN LARA-SANCHEZ claims that she hurt her leg and back when she was working for the Defendants. This injury allegedly occurred when Plaintiff stepped in some mud. The Court is of the opinion that this story has no credibility. Plaintiff's proof of claim form serves to reen-

force the Court's opinion. In her proof of claim form, Plaintiff claims that she hurt her ankle. Nothing is said about the leg or back injury. She testified several times. Each time she testified her injury became worse. The Court finds the injury claims of this Plaintiff to be without any credibility whatsoever. Accordingly, CARMEN LARA-SANCHEZ is to take nothing by way of her personal injuries claim.

**Pedro Hinojos-Morales**

Plaintiff HINOJOS claims that he suffered from dehydration while working for the Defendants. The Court finds this claim to have no credibility. Accordingly, Plaintiff HINOJOS is to take nothing by way of his claim for personal injury.

**Merced Reyes Olivas**

Plaintiff claims that he suffered from a heat stroke while working for the Association. This illness happened while Plaintiff was doing some welding for the Association. Plaintiff paid for the medical treatment he received for this illness. The amount he paid totaled $300. Given the difficulty of medical substantiation in this case, the reasonable settlement value of this claim is $500. Accordingly, Plaintiff is entitled to receive $800 for the personal injury he suffered while working for the Defendants.

**Maria Piedra-Martinez**

Plaintiff Piedra-Martinez claims that she became ill from drinking the water the Defendants provided at the worksite. The Court is of the opinion that this claim has no merit. Accordingly, this Plaintiff is to take nothing by way of her personal injury claim.

**Monserrat Corral de Rodriguez**

This Plaintiff suffered a cut on her right thumb and in-

dex finger while working for the Association. Memo Carrasco told this employee to keep working, despite the cut, or face the consequence of having her H-2 visa revoked. The injury to the fingers became infected, and resulted in the necessity of medical attention. The infection was treated for one month at a cost of $152. This type of injury is a specific injury and has a settlement value of $2,500. Accordingly, Plaintiff is entitled to $2,652 for the personal injury she suffered.

**Bivian Carrillo Valenzuela**

Plaintiff CARRILLO was injured while carrying a heavy sack in the rain. The Plaintiff slipped, and as a result, he hurt his back. This injury occurred in the course and scope of his employment. The injury has reduced Plaintiff's range of motion. The Court is of the opinion that this injury is a total and permanent disability that has a settlement value of $20,000. This condition will require future medical attention in the sum of approximately $5,000. Thus, this Plaintiff is entitled to $25,000 for the personal injury he suffered.

**Marcelino Olivas-Rodriquez**

MR. OLIVAS complained about wetness in his eyes that he claims was caused by his working condition. The Court is of the opinion that there was no merit to this claim. Accordingly, Plaintiff OLIVAS is to take nothing for his personal injury claim.

**Encarnacion Baca-Carrillo**

Plaintiff BACA-CARRILLO broke his wrist while in the course and scope of his employment. Plaintiff's medical expenses were paid for and he was reimbursed for the time he was unable to work. Thus, Plaintiff is not entitled to any recovery for his personal injury claim.

**Guadalupe Valdez-Alvarado**

Plaintiff VALDEZ dropped a heavy sack on his foot while working in 1977. Plaintiff lost three days of work because of this injury, but he should have stayed off work for at least two weeks. The injury to Plaintiff's foot caused a mass to form on his foot. This mass had to be surgically removed at Plaintiff's expense. This injury resulted in some permanent injury to the foot. The Court is of the opinion that this injury has a reasonable settlement value of $1,000. Plaintiff spent $500 on medical attention; thus, Plaintiff is entitled to recover $1,500 for his personal injury.

**Juan Chavez Chaparro**

This Plaintiff was injured in 1978 while in the course of building a ditch for the Association. Plaintiff injured his back as a result of lifting a can filled with wet cement. This injury caused Plaintiff to miss two weeks of work. His back injury is still giving him problems, and he is in need of medical attention. This condition is a partial permament disability that has a settlement value of $12,000. The Court is of the opinion that future medical care in the amount of $5,000 is necessary. Accordingly, Plaintiff is entitled to recover the sum of $17,000 for his injuries.

**Mitigation**

No evidence regarding mitigation appears in the interrogatory answers. However, the testimony revealed that work in Mexico was scarce and sporadic. Women specially had little opportunity for jobs once their contracts were terminated. Wages in Mexico appear to have been approximately $2.50 to $3 per day ($70 MN/day) on days when work was available in such activities as construction, general labor and farm work. Given these facts, it is just and reasonable to make a general assumption that the Plain-

tiffs worked, or could have found work, for three days per week after their contracts were terminated. Therefore, a standard rate of $8.25 per week or $2.75 per day, in mitigation has been subtracted from the damages due each employee for each work day of the guaranteed period of the visa for which work was not available with the Presidio growers.

## V.

In its initial Judgment, the Court held that the members of PVFA were jointly and severally liable for the Association's FLCRA violations. The Defendants did not challenge this holding because PVFA was an unincorporated association in 1977, and under Texas law, the members of an unincorporated association are jointly and severally liable for the association's debts. However, by 1978 PVFA had been incorporated. The Court of Appeals held that, under those circumstances, the members of the Association could not be held liable for PVFA's FLCRA violations. These holdings are the law of the case with respect to Plaintiffs' FLCRA claims, but they do not resolve the issue of joint liability for Plaintiffs' contract damages.

Plaintiffs' FLCRA claims ran only against PVFA. Their contract claims, on the other hand, run against their employers. This Court has previously held that PVFA and its members were joint employers of the visa workers, and that holding was upheld by the Fifth Circuit. *See Salazar*, 765 F.2d at 1346; *Montelongo*, 765 F.2d at 1357. As joint employers, PVFA's members are jointly and severally liable for violations of the employment contract, even though they are not jointly liable for the Association's FLCRA violations. This principle is made explicit by the H-2 regulations in effect during the 1978 season:

> If an association of employers is a joint employer with its employer members, as defined in 655.200, the certification shall be made jointly to the association

> and the employer members. In such cases workers may be transferred among the employer members provided the employer members and the association agree in writing to be jointly and severally liable for compliance with the temporary labor certification obligations set forth in this subpart.

20 C.F.R. 655.206 (b) (3) (1978). The injunction issuing the 1978 visas required the growers to comply with these regulations. Thus, despite the Fifth Circuit's ruling with respect to FLCRA, all Defendants are jointly and severally liable for Plaintiffs' contract damages arising out of both the 1977 and the 1978 seasons.

**Pre-Judgment Interest**

The Court is of the opinion that Plaintiffs are not entitled to pre-judgment interest.

With respect to the damage award for the FLCRA violations, it is clear that pre-judgment interest is not allowed.

Regarding the damages for the breach of the work agreement, pre-judgment interest will not be allowed. This Court is very cognizant of the fact that this case has been around for almost 10 years. Plaintiffs' claims arose in 1977 and 1978; however, it was not until June 5, 1985 that the Texas Supreme Court allowed pre-judgment interest in claims similar to the one at hand. *Cavnar v. Quality Control Parking,* 696 SW2d 549 (1985). Were it not for the unusual nature and circumstances of this case, this cause would have been decided long before Texas recognized pre-judgment interest in this type of situation. To allow pre-judgment interest for the contract claims would simply not be just, especially in light of the fact that Plaintiffs are partially responsible for any delay in the resolution of this case. Furthermore, the Court is of the opinion that the Texas Supreme Court did not intend for *Cavnar* to apply to situations like the one before the Court.

More importantly, the Court is of the opinion that the Plaintiffs' contract claim is inextricably tied to the FLCRA claims. The Court takes notice that the FLCRA and the Fair Labor Standards Act (FLSA) are similar and interrelated. Both statutes serve to protect workers from abuses in the work place. Indeed, the FLCRA can be used to enforce rights conferred by the FLSA. *Castillo v. Givens,* 704 F.2d 181 (5th Cir. 1983). The FLCRA dictated what many of the contract terms had to provide. Some of the terms were rights protected by the FLSA.

The Court is of the opinion that the work agreement issues cannot be treated like the normal run-of-the-mill contract claim. The claims asserted are much like those that would arise under the FLSA, and it is well settled that in FLSA cases, pre-judgment interest is not allowed. *Foremost Dairies, Inc. v. Ivey,* 204 F.2d 186 (5th Cir. 1953); *Barcellona v. Tiffany English Pub,* 597 F.2d 464 (5th Cir. 1977); *Hill v. J. C. Penney Co., Inc.* 688 F.2d 370 (5th Cir. 1982).

Thus, as many of the terms of the work agreement were dictated by the FLCRA, and because Plaintiffs used the FLCRA to enforce rights Plaintiffs had under the FLSA, the Court is of the opinion that pre-judgment interest should not be awarded.

In closing, this Court has determined that Defendants have violated the FLCRA, and that they have breached their work agreement with the Plaintiffs. Plaintiffs are entitled to the liquidated damage award affirmed by the Fifth Circuit, and to their actual damages as set forth in Appendix A.

Because of the complex nature of any cause with more than 500 Plaintiffs in it, the Court has prepared this Memorandum Opinion and Order in such a way as to best explain this Court's decision and Judgment. In so doing, this Court has employed the attached Appendices. They should be considered as express Findings of Fact and Con-

clusions of Law in this action. The body of this Memorandum Opinion and Order should also be so considered. The Court has employed this approach so that, if any reviewing Court is of another opinion as to any controlling principle of law, that Court in its deliberations may render such judgment as it believes is proper in this action.

The Court will enter a Judgment based on the Findings of Fact and Conclusions of Law contained in this Opinion. An Order regarding attorneys' fees will be entered separately. Plaintiffs are to submit Affidavits concerning attorneys' fees within ten (10) days of the entry of Judgment.

SIGNED and ENTERED this 17th day of June, 1987.

LUCIUS D. BUNTON
*U.S. District Judge*

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

| | | |
|---|---|---|
| AMADO SALAZAR-CALDERON, *et. al.* | § | |
| v. | § | NO. P-81-CA-23 |
| PRESIDIO VALLEY FARMERS ASSOCIATION, *et al.* | § | |

**JUDGMENT**

In accordance with the Findings of Fact and Conclusions of Law contained in this Court's Memorandum Opinion and Order entered contemporaneously herewith, the Court enters Judgment as follows:

IT IS ORDERED, ADJUDGED and DECREED that Plaintiffs have and recover from the Defendants, jointly and severally, the sum of SEVEN HUNDRED FIVE THOUSAND, SEVEN HUNDRED TEN and 53/100 DOLLARS ($705,710.53), which is to be awarded as set forth in Appendix A of this Court's Memorandum Opinion and Order.

IT IS FURTHER ORDERED that the Defendants are entitled to an offset in the amount of SIXTY-EIGHT THOUSAND EIGHT HUNDRED THIRTY-ONE and 36/100 DOLLARS ($68,831.36) for the sums they have deposited in the Court's registry.

IT IS FURTHER ORDERED that Defendants pay all costs of court incurred herein, for which execution may issue if not timely paid.

SIGNED and ENTERED this 17th day of June, 1987.

LUCIUS D. BUNTON
*United States District Judge*

**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

NOS. 87-1512, 87-1513 and 87-1701

United States Court of Appeals, Fifth Circuit, Jan. 20, 1989

AMADO SALAZAR-CALDERON, *et. al.*
Plaintiffs-Appellees, Cross-Appellants,

v.

PRESIDIO VALLEY FARMERS ASSOCIATION, *et al.*
Defendants-Appellants, Cross-Appellees.

PRESIDIO VALLEY FARMERS ASSOCIATION,
Plaintiff-Appellant, Cross-Appellee,

v.

ANTONIO MONTELONGO, *et al.*
Intervenors-Defendants, Appellees-Cross-Appellants.

AMADO SALAZAR-CALDERON, *et. al.*
Plaintiffs-Appellants,

v.

PRESIDIO VALLEY FARMERS ASSOCIATION, *et al.*
Defendants-Appellees.

PRESIDIO VALLEY FARMERS ASSOCIATION,
Plaintiff-Counter Claim Defendant-Appellee,

v.

RAY MARSHALL, ETC., *et al.*
Defendants,

ANTONIO MONTELONGO, *et al.*, Intervenors-
Defendants and Counter Claim Plaintiffs-Appellants.

Appeals from the United States District Court for the Western District of Texas.

Before GOLDBERG, HIGGINBOTHAM, and DAVIS, Circuit Judges.

**PER CURIAM:**

Several hundred Mexican farmworkers sued the Presidio Valley Farmers Association and its grower members for breach of their employment agreement and numerous violations of the Farm Labor Contractor Registration Act. The PVFA had hired the workers during the 1977 and 1978 harvest seasons pursuant to "H-2" temporary visas issued by the Immigration and Naturalization Service. The district court entered judgment in favor of the workers, and both sides appealed.

In *Salazar-Calderon v. Presidio Valley Farmers Association*, 765 F.2d 1334 (5th Cir. 1985), *cert. denied*, 475 U.S. 1035, 106 S.Ct. 1245, 89 L.Ed.2d 353 (1986), we affirmed liquidated damages against PVFA and its members, jointly and severally, in the amount of $15 per worker for each of five "technical" FLCRA violations that occurred during the 1977 harvest. However, we vacated the court's $300 liquidated damages award to piece rate workers for a sixth FLCRA violation, "failure to abide by the working arrangement." We remanded the case for a new damages trial on that issue because (1) the trial court omitted from its liability findings and damage award several alleged violations, and provided no explanation for limiting the award to piece rate workers; (2) the trial court had erroneously excluded from the working agreement's terms a weekly transportation allowance, and a guarantee of work or pay for at least three-quarters of the visa period; and (3) the PVFA had not agreed to the district court's procedure for determining these damages.

In *Presidio Valley Farmers Association v. Brock*, 765 F.2d 1353 (5th Cir. 1985), *cert. denied*, 474 U.S. 1073, 106 S.Ct.

833, 88 L.Ed.2d 804 (1986), now on appeal as Montelongo, we adopted the same rulings for FLCRA violations during the 1978 harvest, except that PVFA members were not jointly and severally liable because PVFA had incorporated that year.

On remand, the district court consolidated the two cases and reconsidered its earlier class action decision, certifying a class of H-2 workers pursuant to Fed.R.Civ.P. 23(b)(3). After hearing testimony from 507 class members, the court awarded the workers in *Salazar* and *Brock* $705,710.53 and $333,718, respectively, in actual damages for breach of the "working arrangement." The court also awarded $176,323 and $40,028.50, respectively, in attorneys' fees.

Both sides now appeal. PVFA challenges the trial court's award of actual damages and contends that they were erroneously calculated. PVFA also contends that the court erroneously held the growers jointly and severally liable for PVFA's FLCRA violations during the 1978 harvest. Finally, PVFA argues, that the trial court erred by certifying the class action on remand and by awarding attorneys' fees. The workers urge that the court erred by denying prejudgment interest on damages for breach of the working agreement, denying damages to particular class members, and by failing to include recovery for paralegal and travel time in determining attorneys' fees. For reasons stated below, we affirm in part and reverse in part.

## I

We turn first to the holding that PVFA is liable under state law for breach of contract. We originally vacated the trial court's damage award for a sixth FLCRA violation, "failure to abide by the working arrangement." We remanded the case to allow the district court to redetermine damages for that FLCRA violation in light of "additional

terms" that we found were part of the work agreement. *Salazar*, 765 F.2d at 1353; *Brock*, 765 F.2d at 1357. We did not reopen the legal theory involved. Yet on remand, the district court found PVFA liable under a legal theory not urged in the original appeals, breach of state law contract. This finding reaches beyond our original mandate, and we reverse the district court's findings insofar as they are based on a state law breach of contract theory. *See Stamper v. Baskerville*, 724 F.2d 1106, 1107-1108 (4th Cir. 1984) (trial court may decide matters left open on remand only insofar as they are consistent with appellate court's mandate).

**A. JOINT & SEVERAL LIABILITY**

PVFA attacks the trial court holding that its members are jointly and severally liable for PVFA's violation of the work agreement during the 1978 harvest. The district court acknowledged our previous holding that PVFA's members were not jointly and severally liable for PVFA's FLCRA violations during the 1978 harvest. *See Brock*, 765 F.2d at 1359. The court found, however, that as joint employers PVFA's members could be held jointly and severally liable for breach of state law contract, a theory not available to it, as we have explained. Workers' counsel conceded during oral argument that PVFA's members could not be held jointly and severally liable for PVFA's FLCRA violations because PVFA had incorporated during that year. We must then reverse the court's finding that PVFA's members are jointly and severally liable for PVFA's violation of the work agreement during the 1978 harvest.

PVFA also claims that the district court erred in holding the growers individually liable for liquidated damages previously assessed against PVFA for five "technical" FLCRA violations during the 1978 season. Apparently,

this assessment was not intended by the district court.[1] The workers concede this error in their brief and voice no objection to a modification of the judgment. Accordingly, we modify the district court's decision to reflect that PVFA's members are not individually liable for liquidated damages resulting from PVFA's five "technical" FLCRA violations during the 1978 season.

### B. ATTORNEYS' FEES

PVFA next argues that the trial court erroneously awarded attorneys' fees under Tex.Civ.Prac. & Rem.Code §§ 38.-001-006 (Vernon 1986) for a case based on federal law. The FLCRA does not itself authorize an award of attorneys' fees. *Montelongo v. Meese,* 803 F.2d 1341, 1355 n. 23 (5th Cir. 1986); *Alvarez v. Longboy,* 697 F.2d 1333, 1340-41 (9th Cir. 1983). Workers' counsel conceded at oral argument that their claim to attorneys' fees rested solely upon state law.[2] Because this case is based entirely upon FLCRA, we vacate the district court's award of attorneys' fees in both cases.[3]

## II

We next address claims relating to the district court's damage award on remand.

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[1]While the district court's judgment held PVFA members individually liable for PVFA's 1978 FLCRA violations, the court made clear in its opinion that it only intended to award "the liquidated damage award affirmed by the Fifth Circuit. . . ."

[2]Federal courts may award attorneys' fees to a prevailing party, even in the absence of a statutory provision, where the losing party has acted in "bad faith." *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 258-59, 95 S.Ct. 1612, 1622, 44 L.Ed.2d 141 (1975). The record in the instant case does not support such a finding and the workers make no such claim on appeal.

[3]Accordingly, we do not reach the workers' claim that the trial court erroneously excluded paralegal and travel time from the attorneys' fees awarded them.

## A. ACTUAL DAMAGES

PVFA contends that the district court erred in awarding actual damages for breach of the work agreement on grounds that (1) the FLCRA precludes an award of both liquidated and actual damages; (2) the record does not support the trial court's conclusion that the workers' waiver of actual damages during the first trial was "conditional"; and (3) the workers failed to answer PVFA's interrogatories on actual damages. We reject all three arguments.

First, PVFA argues that the trial court could not award actual damages for a sixth FLCRA violation because it had earlier awarded liquidated damages for five separate violations. PVFA claims that an award for actual damages for breach of the work agreement would constitute double recovery. The workers respond that FLCRA merely prohibits recovery of actual and liquidated damages for the same violation.

The statute at issue, 7 U.S.C. 2050a(b) (repealed 1982), provides that:

> If the court finds that the respondent has intentionally violated any provision of this chapter or any regulation proscribed hereunder, it may award damages up to and including an amount equal to the amount of actual damages, or $500 for each violation, or other equitable relief.

While the plain language of the statute makes clear that FLCRA prohibits recovery of actual and liquidated damages for the same violation, neither party cites relevant cases or legislative history that would resolve the issue as to whether the statute prohibits recovery of liquidated damages for some FLCRA violations and actual damages for other, distinct FLCRA violations.

We reject PVFA's interpretation of the statute and its argument that allowing both actual and liquidated dam-

ages for distinct FLCRA violations constitutes double recovery. The "harm" caused by the five "technical" FLCRA violations, which involved PVFA's failure to process paperwork, bears no relation to the harm that resulted from the sixth FLCRA violation, that the farmers underpaid their workers in violation of the work agreement.[4]

PVFA next urges us to reject actual damages on grounds that the workers waived them at the first trial. On the first appeal, we observed that the workers waived actual damages for breach of the work agreement only after the district court excluded the "core of the plaintiffs' contractual claims" from the terms of the agreement. *Salazar*, 765 F.2d at 1348 & n. 9. Concluding that these terms were erroneously excluded from the agreement, we left the waiver issue for the district court to decide on remand. *Id.* at 1349 & n. 13. On remand, the district court concluded that the workers had "conditioned" their 1984 waiver of actual damages on the defendants' acceptance of a simplified damages proceeding.[5] The court adopted this procedure in calculating its liquidated damage award at the first trial, but the defendants later attacked the procedure on appeal on grounds that they had not consented to try damages in that manner. *Id.* at 1349. Accordingly, the district court ruled on remand that "Plaintiffs' waiver was of no consequence" because it was a "conditional waiver."

We need not decide whether the record supports the trial court's finding that the workers' waiver of actual

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[4]Defendants do not contend that the $300 liquidated damages award for breach of the work agreement constitutes double recovery and provide no explanation of how the trial court's substitute of actual damages for liquidated damages transforms the award into double recovery.

[5]The workers proposed that the court determine liquidated damages from plaintiffs' answers to defendants' interrogatories and testimony from only a sample of "representative" workers to determine employment conditions considered common to all. *Salazar*, 765 F.2d at 1348.

damages was conditional. In remanding the case to the district court to consider terms erroneously excluded from the work agreement, we stated:

> The district court should first address the defendants' argument that plaintiffs have waived their rights to actual damages. If there has been such a waiver, the court may nevertheless find it appropriate to vacate its liquidated damages award for the violations of the work agreement and reassess liability and damages in light of these additional terms.

*Salazar*, 765 F.2d at 1353 n. 18.

On remand, the court cited our instruction and concluded that because additional terms had been included in the work agreement, the prior liquidated damages award must be vacated and actual damages determined. We affirm the district court's equitable discretion to award actual damages in light of these newly included terms.

Finally, PVFA contends that even if the workers' claims for actual damages were reinstated, the workers waived those claims when they failed to respond to an interrogatory asking each worker to specify their actual damages and how they were calculated. The workers respond that they delivered proof of claim forms and a computer printout specifying the damages and calculations for each worker. PVFA counters that the printouts did not comply with Fed.R.Civ.P. 33(a) because they were not answered separately in writing under oath and were not signed.

We find that PVFA has waived any claim of defect in the workers' response to its interrogatory question. At no time did PVFA move to compel more specific answers or oppose the workers' motion for a protective order to allow the workers' attorney to make the specific calculations for the largely uneducated workers. Moreover, we find that even had PVFA not waived this claim, it would fail for lack of prejudice.

**B. CLASS CERTIFICATION**

PVFA next attacks the district court's class action certification under Fed.R.Civ.P. 23(b) (3) on grounds that it violates Fed.R.Civ.P. 23(c) (1) and for want of predominate common questions sufficient to justify a class action under Rule 23(b) (3). We reject both arguments.

Rule 23(c) (1) provides that a class action certification decision "may be altered or amended before the decision on the merits." PVFA argues that the trial court reached the merits on liability and was, therefore, precluded from certifying the class on remand for a determination of damages.

We specifically invited the district court to reconsider its decision denying class action certification on remand. *Salazar,* 765 F.2d at 1350. Such certification decisions are interlocutory and can be altered later under Rule 23(c) (1). *Elster v. Alexander,* 608 F.2d 196, 197 (5th Cir. 1979). *See also* 7B C, Wright & A. Miller, Federal Practice and Procedure § 1785 at 133-35 (1986) (power to alter prior class certification decision has been utilized at various stages in the litigation, including after trial on the merits). We find no violation of Rule 23(c) (1) in the trial court's decision to certify the class on remand.

Rule 23(b) (3) provides that a court may certify a class only if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members. . . ." Fed.R. Civ.P. 23(b) (3). PVFA contends that the court erred on remand by certifying a class solely to redetermine damages. PVFA argues that common questions clearly did not predominate on damages issues, and that such determinations are not suitable for class treatment.

The trial court's certification decision on remand, however, encompassed the already-decided liability issues as well as the remaining damages issues. Common liability

issues existed both as to the five technical FLCRA violations and the inclusion of the three-quarters guarantee and transportation allowance in the work agreement's terms. Because we find that these common liability issues predominated over the more diverse damages issues, we affirm the trial court's certification decision under Rule 23(b) (3). *See Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980)) (upholding appellate court's decision reversing trial court and certifying class action on grounds that entry of judgment for plaintiffs over their objection did not moot the case and terminate their right to appeal denial of certification; plaintiffs desire to spread litigation costs among all class members constituted a continuing interest in the appeal's outcome).

**C. CLASS MEMBERS ENTITLED TO RECOVERY**

The district court initially permitted recovery only for those plaintiffs who were named in one of the original complaints and had filed answers to PVFA's interrogatories. PVFA argues that the district court erred on remand by including in the resurrected class three groups of workers whose claims had been previously barred: (1) those who were named as parties before the first appeal but who failed to answer PVFA's interrogatories; (2) those never named as plaintiffs in the original lawsuits; and (3) those who were members of the Zuniga group of plaintiffs. We agree, and accordingly exclude all three groups from recovery.

The court dismissed the first of these groups of workers for failure to answer PVFA's interrogatories. These workers never appealed the dismissal of their claims. Therefore, they had no claims to revive when the trial court changed its certification decision on remand.

For similar reasons we must deny recovery to group two. Although one subgroup of these workers had answered

interrogatories before the first appeal, the trial court dismissed their claims on grounds that they were never named as plaintiffs in the suit. With the exception of a few workers who were later found to have been named in one of the four complaints, we upheld the trial court's dismissals of these workers. *Salazar*, 765 F.2d at 1351-52. Belated certification does not revive their nonexistent claims.

A second subgroup of unnamed workers submitted class claim forms after the district court certified the class on remand. The two-year statute of limitations had run during the time between the original denial and the district court's reversal. When an appellate court overturns a district court's denial of class certification, the date of original filing, rather than the date of eventual certification, is used to determine whether the claims of potential class members are time-barred. *Satterwhite v. City of Greenville*, 578 F.2d 987, 997 (5th Cir. 1978) (en banc). Were this rule not to apply, appeals of certification would most often be meaningless. However, here we affirmed denial of class certification, even though we invited the district court to reconsider. *Salazar*, 765 F.2d at 1350. The trial court's reconsideration of the certification issue did not, and could not, diminish the import of our affirmance for time preclusion issues. The statute should not toll for those workers who did not intervene or file individual claims after certification was denied.

The workers cite *United Airlines v. McDonald*, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977) for the proposition that the statute of limitations does not run against the claims of putative class members while certification is subject to reconsideration. In that case, the Supreme Court held that a putative class member timely filed her motion to intervene under Fed.R.Civ.P. 24 because she promptly moved to protect unnamed class members when she learned that named class representatives had settled and would not appeal denial of class certification. *Id.* at 396, 97 S.Ct. at 2470-71. The court stressed that McDon-

ald filed her motion (1) to obtain appellate review of the district court's class certification denial, not her individual claim for a substantive Title VII violation; and (2) acted as soon as she realized the named class representative would not protect unnamed class members' interests. *Id.* at 392-94, 97 S.Ct. at 2468-70. Neither consideration applies to the workers at issue.

Finally, we exclude the Zuniga group of plaintiffs because their claim is barred by the statute of limitations. They gained no tolling benefit from the district court's reconsideration of class certification.

The workers challenge the district court's denial of damages to nine class members. We are not persuaded that the district court was clearly erroneous in rejecting the credibility of witnesses testifying on behalf of these workers. In its brief, PVFA points to several contradictions in the testimony that support the district court's credibility decisions. We therefore affirm the district court's denial of damages to these nine workers.

### D. DAMAGE CALCULATIONS

PVFA next contends that in order to calculate actual damages the district court erroneously relied on interrogatory answers, which PVFA contends were inadmissible hearsay. PVFA further objects to inferences drawn by the district court. The trial court's reliance on interrogatory answers and certain inferences, in addition to live testimony, was not an abuse of discretion since the farmers lost or destroyed almost all of the relevant wage records.[6] We

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[6]The farmers contend that we rejected interrogatory answers as inadmissible hearsay on the first appeal. This is not correct. We rejected the district court's procedure for determining damages, which relied in part on interrogatories, because the court did not obtain PVFA's consent to that procedure. The use of interrogatory answers at the second trial was quite different from the first trial. At the second trial every plaintiff testified to the court and the court based its determina-

find the interrogatory answers admissible under Fed.R Evid. 803(24), the catch-all hearsay exception. The damages evidence was bound to be inexact because the second trial occurred nearly a decade after the violations and required testimony from uneducated, non-English speaking laborers. In comparison to the trial date, the claim forms were at least completed relatively soon after the harvest season. This procedure is, in fact, similar to the method we approved in FLSA cases where proof of wages is measured under a looser "just and reasonable inference" standard when employers have kept inadequate wage records. *See Reeves v. International Tel. & Tel. Corp.*, 616 F.2d 1342, 1351 (5th Cir. 1980). In any event, any error was not sufficient to justify a reversal.

This same standard also justifies the trial court's reliance on certain assumptions in extracting damage calculations from this confusing mass of evidence, such as the court's assumption of a 5-day work week and an 8-hour day when neither the workers nor the farmers could provide precise information. Absolute precision in these damages would have been impossible and we find these sound estimates to be adequate.

PVFA also complains that the trial court erred by permitting a computer programmer to testify as an expert witness. The programmer testified about how he generated certain printouts, which compiled damage information from the workers' claim forms and interrogatory answers. The district court admitted the printouts into evidence. PVFA contends that the expert was not qualified to testify about printouts based on inadmissible evidence.

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tion on the live testimony of the workers. Although this does not cure the hearsay defect in the interrogatory answers, the court's procedures at the second trial were more justifiable in light of the difficult nature of the proceedings and the lack of evidence, which is due, in part, to either the farmers' negligence or misconduct.

PVFA's argument is essentially a restatement of its hearsay objection to the interrogatory answers upon which the printouts were based. As previously stated, we affirm the trial court's reliance on the interrogatory responses under Fed.R.Evid. 803(24). Since no objection is made to the individual's computer programming credentials and since his testimony simply established that his printouts compiled this information without distorting it, we find no reversible error.

PVFA next argues that the trial court improperly awarded full damages to workers whose H-2 visas were revoked by INS before expiration. PVFA contends that because the farmers were prohibited from hiring workers without valid visas, such workers have no claim subsequent to revocation. PVFA cites to INS agent Keim's testimony that many aliens admitted pursuant to H-2 visas in 1977 were excludable aliens, and that approximately 50 H-2 visas were later revoked when this was discovered. PVFA also cites to testimony of several workers who acknowledged that their visas had been taken away. The workers point out, however, that INS reclaimed some workers' visas for other reasons, such as when the farmers could no longer provide them with work. Whether or not any particular worker's visa had been revoked, rather than simply "lost" or "taken away" pursuant to the worker's voluntary departure, was a factual question for the trial court. The district court's disposition of this issue is protected by the clearly erroneous standard. In light of the deference due pursuant to this standard, we see no reason to disturb the findings implicit in the trial court's damage award. Because the evidence in the record is ambiguous, we refuse to modify the district court's damage award on this basis.

PVFA also challenges the district court's findings as to the visa expiration dates used to calculate damages. PVFA's visa petitions sought visas for six months in 1977

and seventy days or one year in 1978.[7] Some delay occurred, however, between the time the visas were requested and the time they were issued. In issuing the visas, the INS, on its own, altered the visa's expiration dates to take account of this delay. The court used these new expiration dates in calculating damages. PVFA claims that the visa termination dates used to calculate damages should have been those set forth in the farmers' INS visa petitions. The district court's determination of this issue resolves a factual question about the terms of an ambiguous work contract, and is therefore protected by the clearly erroneous standard. We do not find the trial court's decision to use the visa expiration dates on the visas to be clearly erroneous. The workers were given visas and could have reasonably relied on the dates set forth thereon. Moreover, some growers employed workers for the full period of the visas. Given these facts, the court could have reasonably concluded that the work contract between the growers and the workers was governed by the visa expiration dates on the visas. Because these findings of fact are not clearly erroneous, we affirm the trial court's findings with respect to the visa expiration dates used to calculate damages.

### E. PREJUDGMENT INTEREST

The workers contend that pursuant to Tex.Rev.Civ.Stat. § 5069-1.05 (Vernon 1985), they are entitled to prejudgment interest on actual damages awarded for breach of the work agreement. Because we find this case based entirely on FLCRA, the Texas statute and state law cases cited in the workers' brief are inapposite. We instead turn to federal law.

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[7] PVFA filed H-2 petitions with the INS in 1977 and 1978. PVFA specified in its 1977 petition that it needed 661 workers from May 1, 1977 until November 30, 1977. In 1978, PVFA specified that it needed 330 workers for 70 days from May 1, 1978 until July 10, 1978 and 70 workers for 12 months from May 1, 1978 until April 30, 1979.

An award of prejudgment interest is not precluded simply because the damages are based on FLCRA. In *Montelongo v. Meese,* 803 F.2d 1341, 1354 (5th Cir. 1986), we reversed an award of prejudgment interest for liquidated damages under FLCRA on grounds that prejudgment interest is awarded to fully compensate a plaintiff for an actual monetary loss sustained as a result of a defendant's breach of an obligation. *Cf. Illinois Central Railroad Co. v. Texas Eastern Transmission Corp.,* 551 F.2d 943, 944 (5th Cir. 1977) (contrasting actual damages with penalties, on which prejudgment interest does not normally accrue). We noted, however, that interest from the date of the breach would have been "appropriate" had plaintiffs chosen to recover actual damages. *Id.*

We see no bar to an award of prejudgment interest on actual damages based on FLCRA. However, we are persuaded that such determinations are within the discretion of the trial court. *Bricklayers' Pension Trust Fund v. Taiariol,* 671 F.2d 988, 990 (6th Cir. 1982) (decision whether to award prejudgment interest within discretion of district court); *Oil, Chemical & Atomic Workers International Union, Local No. 4-447 v. American Cyanamid Company,* 546 F.2d 1144 (5th Cir. 1977) (argument that plaintiffs should be awarded prejudgment interest to make them whole is insufficient to find that district court abused its discretion). We find no basis for holding that the district judge abused his discretion in denying prejudgment interest on actual damages based on FLCRA.

The judgment of the district court is, accordingly

AFFIRMED IN PART and REVERSED IN PART.

**APPENDIX D**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NOS. 87-1512, 87-1513 and 87-1701

AMADO SALAZAR-CALDERON, *et. al.*
Plaintiffs-Appellees, Cross-Appellants,

v.

PRESIDIO VALLEY FARMERS ASSOCIATION, *et al.*
Defendants-Appellants, Cross-Appellees.

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Appeals from the United States District Court for the Western District of Texas.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (Opinion 1-20-89, 5 Cir., 198_, _____F.2d_____) (March 20, 1989)

Before GOLDBERG, HIGGINBOTHAM, and DAVIS, Circuit Judges.

**PER CURIAM:**

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Patrick E. Higginbotham
*United States Circuit Judge*